78-599

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

PRIVATE FRANK L. HUFF, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Secretary of the Navy and the other federal defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-32a) is reported at 575 F.2d 907. The opinion of

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[1] The other defendants are the Commandant of the Marine Corps and several military officers responsible for implementing and enforcing Navy and Marine Corps regulations in the Pacific Fleet and at the Marine Corps Air Station in Iwakuni, Japan.

the district court (App. B, *infra*, 33a-50a) is reported at 413 F. Supp. 863.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 51a-52a) was entered on March 15, 1978. A petition for rehearing was denied on May 15, 1978 (App. D, *infra*, 53a). On August 7, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 12, 1978. On September 1, 1978, Mr. Justice Brennan further extended the time to October 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Navy and Marine Corps regulations that require military personnel located at a foreign duty station to obtain approval before circulating on the base petitions to members of Congress are invalid under 10 U.S.C. 1034.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 10 U.S.C. 1034 provides:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

3. Fleet Marine Force Pacific Order (FMFO) 5370.3 (1974) provides in relevant part:[2]

a. Section 3(b).

> No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.

b. Section 4(a).

> Commanding generals and commanding officers will control or prohibit the unauthorized activities described in subparagraphs

[2] Four Navy and Marine Corps regulations are at issue in this case. Each regulation has the same operative language as the one quoted in the text; they differ only on the geographic area in which they apply. See App. A, *infra*, 7a. The challenged regulations are paralleled by regulations adopted by the Army and Air Force. See *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972).

3a, 3b, and 3c above if, in their judgment, the activity would:

> (1) Materially interfere with the safety, operation, command, or control of his unit or the assigned duties of particular members of the command; or,
>
> (2) Present a clear danger to the loyalty, discipline, morale, or safety to personnel of his command; or
>
> (3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates, insubordination, disloyalty, mutiny, refusal of duty, solicits desertion, discloses classified information, or contains obscene or pornographic matter; or
>
> (4) Involve the planning or perpetration of an unlawful act or acts.

STATEMENT

1. Navy and Marine Corps regulations provide that no servicemen shall "distribute or promulgate petitions, publications * * * handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or * * * on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained." FMFO 5370.3, § 3(b) (1974). The regulations further provide that the commanding officer should deny approval if the material proposed for distribution would

(1) materially interfere with the safety or duties of the command, (2) "[p]resent a clear danger to the loyalty, discipline, morale, or safety" of the personnel in the command, (3) cause or advocate insubordination, disloyalty, desertion, or contain obscene matter, or (4) involve the planning of an unlawful act. *Id.*, § 4(a).

During 1974 respondents, three Marine Corps servicemen stationed at the United States Marine Corps Air Station at Iwakuni, Japan, sought prior approval from their base commander to distribute copies of petitions to members of Congress. One petition objected to the use of military personnel in labor disputes; a second supported amnesty for those who resisted conscription or deserted the armed forces during the Vietnam war (App. B, *infra*, 39a). The base commander denied permission to circulate these two petitions on the base (*ibid.*).[3] Respondents Huff and Falatine distributed, without seeking permission, copies of a third petition objecting to United States support for the government of South Korea (*id.* at 40a). They were arrested; Huff was convicted after a court-martial. After the arrests respondent Gabrielson sought permission to distribute the South Korea petition on and off the base; the base commander granted permission for on-base circulation, provided that the circulation was non-argumentative and did not take place in the barracks (*id.* at 40a-41a).

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[3] After their request to circulate these petitions was denied, respondents sought permission to circulate a leaflet setting

Respondents then filed this action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief against further enforcement of the military regulations. They alleged that the regulations are an unconstitutional restraint on First Amendment expression and are invalid under 10 U.S.C. 1034, which prohibits any person from "restrict[ing] any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." Respondents sought, and obtained, certification of the case as a class action "on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan * * *."[4]

The district court granted respondents' motion for summary judgment. The court held that "the very system of prior restraints for serviceman-to-serviceman distribution of materials on-base during off-hours and away from restricted or work areas, is unconstitutionally restrictive of First Amendment freedoms" (App. B, *infra*, 45a). The court also concluded that the base commander's decision to prohibit or restrict distribution of the three specific petitions to

forth their interpretation of the constitutional rights of servicemen (*ibid.*). The base commander denied permission to circulate this leaflet as well (*ibid.*). During the course of this litigation petitioners conceded that the base commander lacked a proper basis under the military regulations for refusing to allow distribution of these materials (App. A, *infra*, 3a).

[4] Order filed July 17, 1975, at 4.

members of Congress was not grounded in a sufficient showing of military necessity and was therefore invalid under 10 U.S.C. 1034 (App. B, *infra*, 44a).[5] Accordingly, the court entered an injunction prohibiting the military officials from applying the challenged regulations to require prior approval for the "distribution of printed materials during off-hours and away from restricted or work areas on-base at the Marine Corps Air Station, Iwakuni, Japan" (App. F, *infra*, 57a).

2. The court of appeals held that the "focal point" of the litigation is on petitions to members of Congress and that the validity of the regulations with respect to other types of written materials could not properly be decided on the record in this case (App. A, *infra*, 5a-7a). The court therefore rejected the broad holding of the district court that the prior approval requirement of the regulations is invalid as applied to all written materials distributed on base (*id.* at 5a-7a, 21a).

The court of appeals found it unnecessary to decide whether the regulations' requirement that military authorities give prior review to petitions to members of Congress is an unconstitutional "prior restraint" on expression.[6] The court concluded in-

[5] The district court upheld application of the prior approval requirement to off-base petitioning in foreign countries (App. B, *infra*, 48a-50a). Accordingly, it did not disturb the sanctions imposed for the off-base distribution of the South Korea petition (see *id.* at 50a).

[6] The court noted, however, that under *Parker* v. *Levy*, 417 U.S. 733 (1974), "the presumption against prior restraints

stead that application of the prior approval requirement to such petitions is invalid under 10 U.S.C. 1034, which prohibits regulatory restrictions that are not "necessary to the security of the United States." Although the court recognized that the prior approval requirement contributes to "order and discipline" at the "combat ready" Iwakuni Air Station,[7] the court concluded that avoiding "lapses of military discipline" is not "necessary to the national security" (App. A, *infra*, 16a). Moreover, the court suggested that the military interest in preventing on-base distribution of "petitions which prove to be improper in their content" (*id.* at 17a) may be adequately protected by sanctions imposed after distribution has occurred. The court thus affirmed the injunction to the extent that it forbids application of the prior approval requirement to the distribution of servicemen's petitions to members of Congress.

Judge Tamm filed a separate opinion arguing that the judgment of the district court should be reversed in its entirety (App. A, *infra*, 22a-32a). Reviewing the legislative history of 10 U.S.C. 1034, Judge Tamm determined that the statute is intended to

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would not be as great [in the military context] as it is in the civilian context; and we would be required to undertake a careful balancing of competing first amendment interests and military requirements" (App. A, *infra*, 9a).

[7] During 1972 and 1975 units were deployed directly from Iwakuni Air Station to combat and relief operations in Viet Nam. Similar deployments to Thailand and Cambodia also occurred during these years (App. A, *infra*, 28a-29a).

proscribe only interference with a serviceman's personal, private communications to members of Congress. Application of the prior approval requirement to the distribution of petitions, however, affects only collective petitioning activities and does not restrict personal or private communications. Accordingly, Judge Tamm concluded, 10 U.S.C. 1034 does not apply to the regulations challenged in this case (App. A, *infra*, 26a). Judge Tamm also argued that even if Congress intended 10 U.S.C. 1034 to apply to both individual and collective petitioning activity, the prior approval requirement is valid because the maintenance of order, discipline, loyalty, and morale at a combat-ready military facility is necessary to the security of the United States within the meaning of that statute (App. A, *infra*, 26a-31a).

REASONS FOR GRANTING THE PETITION

The military departments of the United States believe that some form of prior review by command personnel of proposals to circulate petitions on military bases is essential to the discipline, readiness and morale of the armed forces, and is thus necessary to the security of the nation. Under the decision of the court of appeals, however, the military departments are powerless to stop the on-base circulation of petitions to members of Congress even when such petitions pose a clear danger to military discipline, loyalty, or morale, even when they materially undermine the effective accomplishment of the assigned military mission, and even when the petitioning occurs at a

combat-ready facility on the periphery of our defensive arrangement. The decision of the court of appeals thus raises a significant question of law involving, at least in part, the roles of the judiciary and the executive in determining the requirements of military order and our national security.

The effect of the court's holding is far broader than the court's description indicates. Although the court held only that the prior approval requirement is invalid for petitions to members of Congress, it should be clear that complaints and advocacies of all types may be couched in the form of petitions to Congress. The decision in this case thus opens a substantial breach in the regulations. Furthermore, rules of jurisdiction and venue allow any future litigation concerning these regulations to be brought in the District of Columbia.[8] Accordingly, the decision of the court of appeals is, as a practical matter, binding on all United States military bases throughout the world.

1. The prior approval requirement of the challenged regulations does not prohibit or otherwise in-

[8] 28 U.S.C. 1331(a), as amended by the Act of Oct. 21, 1976, Pub. L. No. 94-574, Section 2, 90 Stat. 2721, creates jurisdiction in the district court, without regard to the amount in controversy, whenever the government or one of its employees is sued on a claim arising under federal law. In such cases, 28 U.S.C. 1391(e) provides for venue in the district where one of the defendants resides. In cases challenging military regulations, a defendant residing in the District of Columbia almost always could be named. This case illustrates the effect of Section 1391(e); the dispute involves a base in Japan, yet the controversy was litigated in the District of Columbia because the complaint named the Secretary of the Navy and the Commandant of the Marine Corps as defendants.

terfere with a serviceman's personal, private communications to members of Congress. The regulations address only the distribution of written materials at military facilities. The district court held, nevertheless, that the prior approval requirement is an unconstitutional "prior restraint" on expression (App. B, *infra*, 45a).[9] Although the court of appeals did not reach this constitutional question, it suggested that the question is substantial (App. A, *infra*, 7a-8a and n.13). Because the court of appeals may have been construing 10 U.S.C. 1034 broadly to avoid reaching the constitutional issue, we first discuss that question.

This Court has held that military commanders may restrict collective activity at military installations that interferes with the performance of the military

[9] In *Glines* v. *Wade*, 401 F. Supp. 127 (N.D. Cal. 1975) (appeal pending), and *Allen* v. *Monger*, 404 F. Supp. 1081 (N.D. Cal. 1975) (appeal pending), two other district courts have held these same regulations to be unconstitutional. These courts concluded that the prior approval requirement of the regulations is an unconstitutional "prior restraint" on conduct that is protected by the First Amendment. *Glines* v. *Wade*, *supra*, 401 F. Supp. at 130; *Allen* v. *Monger*, *supra*, 404 F. Supp. at 1090. The courts held that the military need for prior review is "insubstantial" outside of the wartime combat situation. *Glines* v. *Wade*, *supra*, 401 F. Supp. at 130; *Allen* v. *Monger*, *supra*, 404 F. Supp. at 1090. These cases, however, were decided prior to this Court's decision in *Greer* v. *Spock*, 424 U.S. 828 (1976). They also relied, at least in part, on an improper analogy between the prior approval requirement of the challenged regulations and the type of final "prior restraint" on First Amendment activity struck down in *Near* v. *Minnesota*, 283 U.S. 697 (1931), and *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). See note 11, *infra*.

mission or endangers the loyalty or morale of the command. In *Greer* v. *Spock*, 424 U.S. 828 (1976), the Court upheld an Army regulation that required the "prior written approval" of the base commander before any person could distribute "any publication" on base. *Id.* at 831. Under the regulation challenged in *Greer* v. *Spock*, the base commander was required to deny permission to distribute written materials where "the dissemination * * * presents a clear danger to the loyalty, discipline, or morale of troops at [the] installation * * *." *Id.* at 831 n.2. The Court dismissed the contention that this restraint on the distribution of written materials at military facilities violates the First Amendment (*id.* at 840; footnote omitted):

> The only publications that a military commander may disapprove are those that he finds constitute "a clear danger to [military] loyalty, discipline, or morale," and he "may not prevent distribution of a publication simply because he does not like its contents," or because it "is critical —even unfairly critical—of government policies or officials * * *." There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

The regulations at issue in this case are substantially identical in purpose and effect to the regulation upheld in *Greer* v. *Spock*.[10] The base commander must

[10] The decision in *Greer* v. *Spock* is not distinguishable on the ground that petitions to members of Congress are involved in this case. The regulation upheld in *Spock* required prior approval for the distribution of "handbills, flyers, circulars, pamphlets or other writings" as well as "any publication," *id.* at 831, and was thus plainly broad enough to encompass such petitions. It was applied in *Spock* to prohibit the presidential campaigning of a private person; the campaign was as much part of the political process as the petitions involved in this case.

approve distribution of written materials unless the distribution presents "a clear danger to the loyalty, discipline, or morale" of the affected servicemen, the materials advocate desertion or insubordination, or they materially interfere with the duties or safety of the command. *Greer* v. *Spock* indicates that it is constitutionally permissible for military authorities to proscribe the on-base distribution of written materials that offend these substantial military interests. See also *Parker* v. *Levy*, 417 U.S. 733, 759 (1974). *Greer* v. *Spock* further establishes that a requirement that materials be submitted to the base commander for approval prior to distribution is an appropriate and permissible means of enforcing this proscription. 424 U.S. at 840.[11]

[11] This aspect of the decision in *Greer* v. *Spock* is not inconsistent with "prior restraint" cases such as *Near* v. *Minnesota*, 283 U.S. 697 (1931), and *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). These cases concern the situation where the "prior restraint" is a *final* restraint intended to prohibit the distribution of published materials. The "prior approval" requirement of the regulations challenged in *Greer* v. *Spock* and in this case, however, is only a temporary screening device that is necessary to identify those materials that actually are and permissibly may be finally restrained. See

This Court had often held that persons who work for the government may have speech rights less extensive than those of private citizens, when the difference promotes the effective functioning of governmental services. See *CSC* v. *National Association of Letter Carriers*, 413 U.S. 548, 564-565 (1973); cf. *Kelley* v. *Johnson*, 425 U.S. 238, 245 (1976). *Greer* v. *Spock* applies this principle to military bases, and it governs here as well. The regulations at issue in this case strictly limit the grounds on which commanders can disapprove circulation of petitions. It therefore can be expected that most petitions will be approved for circulation. Moreover, nothing in the regulations restrains personal, private communications with Congress. Accordingly, the regulations raise no serious unsettled constitutional question, and there is no need to construe 10 U.S.C. 1034 to avoid facing the constitutional issue that *Greer* v. *Spock* has settled.

2. The court of appeals concluded that the "prior approval" requirement of the regulations is invalid under 10 U.S.C. 1034 because "no showing has been made that a system of prior restraint on petitioning activities on the Iwakuni Air Station is necessary to the national security" (App. A, *infra*, 16a). The court of appeals did not purport to hold, however, that a screening of petitions prior to distribution at the military base would not *contribute* to the security

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Freedman v. *Maryland*, 380 U.S. 51 (1965) (licensing of motion pictures); *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43 (1961) (same).

of the United States. The court accepted the explanation of military commanders (App. G, *infra*, 58a) that the screening of petitions would contribute to "order and discipline" (App. A, *infra*, 16a), and the court did not dispute that military discipline is significantly related to the security of the nation, see *Greer* v. *Spock*, *supra*, 424 U.S. at 840. The court concluded, however, that "the national security can [not] be said to require that the objective of military discipline be pursued to the exclusion of all other interests" (App. A, *infra*, 16a). The court also stated that the military interest in assuring discipline and order may be protected by post-distribution punishment of servicemen who petition on improper matters. *Id.* at 17a.

There are two critical assumptions underlying the decision of the court of appeals: (1) Congress determined in 10 U.S.C. 1034 that lapses in military discipline, loyalty and morale (and thus in military preparedness) are to be tolerated to provide an unrestricted right to petition; and (2) discipline, loyalty and morale can be maintained by punishment imposed after the distribution of improper materials. These assumptions do not withstand analysis.

First, there is no support in the legislative history of Section 1034 for the court of appeals' assumption that Congress sought to protect on-base petitioning at the expense of the nation's military preparedness. The statute expressly authorizes regulations that are "necessary to the security of the United States." It has always been recognized that military preparedness, and thus the security of the nation, depends on

military loyalty, discipline, and order. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. The military must be prepared for immediate action. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). History teaches vividly that the readiness of the armed forces to respond instantly and without internal division when the need occasions is of the utmost importance to our national security whether we are in a state of perceived peace or in a state of declared war.

This concern is of special prominence at a combat-ready advance base such as the Iwakuni Air Station. The base took part in combat and relief activities conducted throughout Southeast Asia in 1972 and 1975. See note 7, *supra*. Moreover, as the affidavit of the former commander of the Iwakuni base states (App. A, *infra*, 29a):

> At any time, the Wing may again be called upon to deploy under similar circumstances on a moment's notice. In this eventuality, the highest degree of loyalty, discipline, and morale will be necessary for the successful completion of the mission.
>
> Personnel who are constantly prepared for deployment into combat or a crisis situation must at all times have the same strict discipline and high morale as would troops in actual combat situations. * * * The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. * * * These traits must be inherent in each Marine before he goes into combat and not a learning process reserved for the actual battlefield. Individual or collective efforts by those who would attempt, consciously or otherwise, to undermine good order, discipline, loyalty, and morale, cannot be tolerated.

In determining the extent to which the rule of prior approval contributes significantly to and is thus "necessary to" our national security,[12] the court of appeals gave insufficient weight to the military departments' evaluation of the needs of military loyalty, morale and discipline. See *Parker* v. *Levy*, *supra*, 417 U.S. at 758-759; *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953); *Culver* v. *Secretary of the Air Force*, 559 F.2d 622, 633 (D.C. Cir. 1977) (Leventhal, J., concurring). The determination of the military authorities that the distribution of materials that (i) injure discipline and order, or (ii) counsel disloyalty or desertion, or (iii) interfere with the accomplishment of the military mission, should be restricted to protect our national security is based "in reasoned policy, rather than capriciousness," *ibid.*, and should not have been overturned by the courts below.

Second, the court of appeals' assumption that punishment after the fact would safeguard the national security interest that underlies this regulation is unsupported. The injury to national security occurs when the improper material is distributed and dis-

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[12] The requirement in 10 U.S.C. 1034 that the regulation be "necessary to" the national security cannot be understood to mean that, but for the regulation, the nation would be conquered or compromised. If it were so construed, the statute would constitute what it purports not to be—an absolute prohibition against military regulatory restraints

cipline and morale are lowered, or the military mission is threatened. We do not dispute that, in some circumstances, the prospect of punishment after the fact would discourage servicemen from engaging in improper activity. In at least two circumstances, however, a system of post hoc sanctions would be inadequate unless supplemented by a requirement of prior approval: (1) where a serviceman innocently but incorrectly concludes, without review by the base commander, that the materials are proper for distribution; and (2) where a serviceman determines, despite threatened post-distribution sanctions, to distribute improper materials. The prior approval requirement responds to both of these concerns: (1) it permits the military commander to identify and prohibit distribution of improper materials before any distribution occurs; and (2) it permits immediate action to curtail distribution where approval has been denied or has not been sought. By thus preventing the distribution of improper materials before they can accomplish substantial harm, the prior approval requirement is necessary to the accomplishment of the objectives of the regulation. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Cf. *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43, 49-50 (1961).[13]

[13] Prior approval requirements in similar military regulations have been upheld on the ground of military necessity by other federal courts. See, *e.g.*, *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972); *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971). But see note 9, *supra*.

3. The decision of the court of appeals is in error for the additional reason that the language and history of 10 U.S.C. 1034 indicate that it is concerned only with private communications from individual servicemen to members of Congress and not with public circulation of group petitions. The regulations at issue are addressed only to group petitions.

By its terms, 10 U.S.C. 1034 applies to the activity of a "member of an armed force in communicating with a member of Congress * * *." The statute does not mention joint petitioning or other public, collective activity. Moreover, as Judge Tamm pointed out (App. A, *infra*, 24a-25a), the statute was enacted in response to an incident in which an individual sailor was denied permission to communicate with a member of Congress concerning a shipboard grievance. Representative Byrnes, the sponsor of the statute, agreed in discussion on the House floor with Representative Vinson that "the purpose [of the provision is] to permit any man who is inducted to sit down and take a pencil and write to his Congressman or Senator." 97 Cong. Rec. 3775-3777 (1951). See also *id.* at 3883 (Rep. Byrnes); *id.* at 3877 (Rep. Vinson). The Conference Report on the statute also indicates that the focus of the legislation is on individual, rather than collective, communications. H.R. Conf. Rep. No. 535, 82d Cong., 1st Sess. 22 (1951). Nothing in the legislative history of 10 U.S.C. 1034 indicates that Congress intended to protect group activity.[14]

[14] The court of appeals relied solely on a Department of Defense Directive in concluding that Congress intended to pro-

The absence of any congressional reference to group petitioning in 10 U.S.C. 1034 is significant in understanding the congressional intent because, in its enactment of analogous legislation, Congress has been careful to refer to both individual and collective activity. For example, 5 U.S.C. 7102 provides that "[t]he right of [civil service] employees, individually or collectively, to petition Congress or a Member of Congress * * * may not be interfered with or denied." In light of the interference with military discipline, order and preparedness that can result from group petitioning activity, 10 U.S.C. 1034 is best understood as a response to the particular concern that motivated its enactment. The court of appeals erred in reading the statute to apply to public, collective petitions and in reaching a result that renders military authorities powerless to prevent action significantly adverse to the proper and effective functioning of the armed forces.

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tect joint petitioning activity (App. A, *infra*, 12a). The Directive, however, casts no light on this issue. It states only that a serviceman "may petition or present any grievance to any member of Congress" (*ibid.*). The court found significance in the use of the word "petition" in the Directive, concluding that this implies group activity (*ibid.*). But the Department of Defense has never interpreted its Directive in this way—as the regulations at issue here demonstrate. Judge Tamm pointed out that a petition "can be signed either by one person or many persons," and the context of the Directive indicates that the singular sense is intended (*id.* at 25a n.1). At all events, the Directive is no substitute for legislative history.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 76-1828

PRIVATE FRANK L. HUFF, ET AL.

v.

SECRETARY OF THE NAVY, ET AL., APPELLANTS

Argued Oct. 19, 1977

Decided March 15, 1978

Rehearing and Rehearing En Banc
Denied May 15, 1978

Before MCGOWAN, TAMM and ROBINSON, Circuit Judges.

Opinion for the Court filed by Circuit Judge MCGOWAN.

Opinion filed by Circuit Judge TAMM, concurring in part and dissenting in part.

MCGOWAN, Circuit Judge:

This is an appeal from a judgment of the District Court enjoining the enforcement at the Marine Corps Air Station in Iwakuni, Japan of certain Marine Corps and Navy regulations which require prior approval for the circulation by military personnel of, *inter alia*, petitions to members of Congress. 413 F. Supp. 863 (1976). The District Court declared the

regulations violative of both the first amendment and 10 U.S.C. § 1034 (1970) insofar as they apply to materials distributed on-base during off-hours and away from restricted or work areas. For the reasons appearing herein, and by reference to the statutory, as distinct from the constitutional, ground, we affirm the District Court's judgment insofar as it relates to petitions, and vacate it insofar as it extends to other materials unrelated to the petitioning process.

I

The procedural posture of this appeal is complicated in two respects. We describe them in some detail in order that the precise issue addressed and decided in this opinion may be identified and understood.

The first complication relates to the nature of the attack upon the regulations. This challenge was certified by the District Court as a class action on behalf of all members of the Marine Corps assigned to the Iwakuni Air Station. Each of the three named plaintiffs had sought and largely been denied approval to circulate, on and off-base, petitions and certain related materials. Two of these plaintiffs nevertheless undertook such distribution; both were arrested and one was convicted in a court-martial. On cross-motions for summary judgment, the District Court upheld the regulations as they pertain to off-base distribution of materials in a foreign country, and therefore denied the named plaintiffs' request for injunctive relief relating to the arrests and court-martial for unauthor-

ized off-base distribution.[1] Appellees have not cross-appealed from this portion of the District Court's judgment; and the issue of prior approval for off-base distribution of written materials generally is therefore not before us on this appeal.

However, the District Court did grant declaratory and injunctive relief to both the named plaintiffs and the class with respect to on-base distribution. The Court held that the challenged regulations constitute an unlawful prior restraint upon circulation of materials by service personnel away from restricted areas during off-duty hours. Appellant armed forces officials have conceded, both in the District Court and on this appeal, that the specific requests for on-base distribution made by the named plaintiffs should not have been denied under the applicable regulations.[2]

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[1] The District Court held that because off-base political activity could violate the Status of Forces Agreement between the United States and Japan, which restricts political activities of members of our armed forces in Japan, a system of prior restraint with respect to such activity was reasonable.

[2] The complaint states four instances in which appellees were denied permission to distribute materials on-base. On May 2, 1974, appellee Huff requested permission to solicit signatures on a petition addressed to Senator Cranston, objecting to the use in labor disputes of military and national guard personnel. On May 8, 1974, appellee Falatine requested permission to solicit signatures for a petition to Congressman Dellums, supporting universal and unconditional amnesty for those who resisted the draft or were deserters during the Vietnam war. On May 20, 1974, both these requests were denied on the ground, *inter alia*, that they impugned "by innuendo the motives and conduct of the Commander-in-Chief."

Their petitioning requests having been denied, Huff and Falatine on June 24, 1974, each sought permission to circulate

However, appellants do contest the broad holding that the system of prior restraint imposed by the regulations is itself invalid. Thus, the question presented

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a leaflet entitled "We hold these Truths to be Self-Evident (But Do the Brass?)." The leaflet contained the first amendment and portions of the Declaration of Independence (with "modern interpretation[s]" thereof), and an introductory paragraph which read:

> In two years our country will have its 200th birthday. Many of the basic principles our country was founded upon like the Declaration of Independence and the First Amendment are really "Right On". Yet many of our "superiors" call anyone who tries to exercise his First Amendment right to freedom of speech and press a "communist". They also put down anyone who really believes in our Declaration of Independence which upholds the right of the citizens of any country to change their government when it becomes unresponsive to their needs and the idea that the people of a country should be able to choose their own form of government even if the leaders of our government disagree with their choice.

Huff's request to distribute the leaflet off-base was granted, but Falatine's request for on-base distribution was denied, on the ground that "[t]he introductory paragraph is, by transparent implication, disrespectful and contemptuous of all your superiors, officers, non-commissioned officers and civilians alike."

Finally, on July 30, 1974, appellees Huff, Falatine, and Gabrielson requested permission to distribute a letter to Senator Fulbright, objecting to American support of the regime in South Korea. Huff, Falatine, and three other Marines had been arrested on July 12, 1974 for distributing this same letter off-base without prior approval, and the three July 30 requests sought to distribute a statement concerning the upcoming court-martials of those arrested on July 12, as well as copies of the Fulbright letter itself. Although Huff's and Falatine's requests for on-base distribution were granted, Gabrielson was denied permission to distribute the material in the barracks.

on this appeal is whether the challenged regulations are facially invalid insofar as they require prior approval for off-duty, on-base distribution in non-work areas.

The second complication relates to the particular type of activity upon which the regulations are alleged to be an unlawful prior restraint. The regulations broadly apply to "originat[ing], sign[ing], distribut[ing], circulat[ing] or promulgat[ing] petitions, publications . . . pamphlets, newspapers, magazines, handbills, flyers or other similar printed or written material,"[3] and the District Court's order applies with equal breadth to any distribution of any material in the on-base context heretofore described. However, we believe that this appeal can and should be resolved by reference only to that activity which is the focal point of both the regulations and the requests made by the named plaintiffs, namely, petitioning by servicemen of members of Congress.

Petitions are the first type of material mentioned in the regulations, and petitions are the only type of material to which all the activities proscribed (originating, signing, distributing, circulating and promulgating) can literally apply. Three of the four requests for permission to distribute on-base described in the complaint directly involved petitions to members of Congress.[4] The fourth request as well appears to

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[3] *See* text accompanying note 11 *infra*.

[4] The material sought to be distributed by appellee Gabrielson included both a letter to a congressman and a statement concerning arrests of other Marines for previously distributing the letter without prior approval. *See* note 2 *supra*.

have borne a close and clearly derivative relationship to these frustrated petitioning efforts. That request —to distribute a leaflet quoting the first amendment and portions of the Declaration of Independence—was made by two appellees who had each shortly before been denied permission to circulate petitions. The "modern interpretation" of the first amendment contained in the leaflet included the statement that "the government cannot take away our right to circulate petitions," and the title of the leaflet and introductory paragraph indicate that its purpose was to declare the view that commanding officers, who had denied the requests, were not acting consistently with the principles of the first amendment and the Declaration of Independence. *See* note 2 *supra.*

The causal connection between the initial unsuccessful attempts to circulate petitions, on the one hand, and the subsequent request to distribute the Declaration of Independence, on the other, is even more apparent when one considers that a principal grievance stated in the Declaration itself was that

> [i]n every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.

The Signers of the Declaration felt compelled to state their grievances to the world after those in authority rebuffed their petitions and other efforts to resolve those grievances. Appellees in this case, blocked in their attempts to petition the Congress, sought in aid of those attempts to point out that refusal to allow

such petitions appeared to violate the principles stated in the Declaration.[5]

Thus we consider that the record illuminates in concrete factual terms only the question of the validity of the regulations as they pertain to activity directed towards the petitioning of Congress. Finding, as we do, that prior restraint in such a case is at odds with the statutory command of Congress, we believe the essential grievance suffered in this case is met by limiting declaratory and injunctive relief to the petitioning context. The availability of such relief always resides in the sound discretion of the court,[6] and we see neither the necessity nor the desirability of reaching on this record the question of the facial validity of the regulations with respect to materials other than petitions to Congress.

II.

The four challenged regulations, all of which have the same operative language, differ only in the scope of the geographic area to which they apply. Thus, the regulations are in the form of a Pacific Fleet Instruction,[7] a Fleet Marine Force Pacific Order,[8] a First Marine Aircraft Wing Order,[9] and a Iwakuni

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[5] *See* note 2 *supra.*

[6] *See Great Lakes Co.* v. *Huffman,* 319 U.S. 293, 299-300, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. VI 1976).

[7] CINCPACFLTINST 5440.3c (1974).

[8] FMFO 5370.3 (1974).

[9] MAWO 5370.1A (1973).

Marine Corps Air Station order.[10] The operative language states that Marine Corps personnel within the relevant command area shall not

> originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, or any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.[11]

This requirement clearly constitutes a prior restraint upon petitions to Congress. Indeed, the requirement of command authorization is interposed at every stage of the petitioning process, from drafting the document to circulating it to signing it.[12]

Were we considering the validity of this restraint under the first amendment, the next step in that consideration would be to examine the standards which guide commanders in deciding whether to authorize petitioning activities. In the civilian context the standards would have to be narrow, objective, and definite, *see Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), and there would be "a heavy presumption against

[10] MCASO 5370.3A (1973).

[11] FMPO 5370.3 (1974).

[12] In October of 1974, MAWO 5370.1A and MCASO 5370.3A were altered slightly to exclude the term "originate."

[the] constitutional validity" of the system of censorship implemented by the challenged regulations. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975). However, "the different character of the military community and of the military mission . . . may render permissible within the military that which would be constitutionally impermissible outside it," *Parker* v. *Levy*, 417 U.S. 733, 758, 94 S.Ct. 2547, 2563, 41 L.Ed.2d 439 (1974). Under this more lenient constitutional standard applicable to restrictions on first amendment rights within the military sphere, the presumption against prior restraints would not be as great as it is in the civilian context; and we would be required to undertake a careful balancing of competing first amendment interests and military requirements.

Although the District Court in this instance, and other courts presented with the same issue as that raised on this appeal,[13] have undertaken the foregoing

[13] *Allen* v. *Monger*, 404 F.Supp. 1081 (N.D. Cal. 1975) (Peckham, J.), *appeal pending*, 9th Cir. No. 76-125; *Glines* v. *Wade*, 401 F.Supp. 127 (N.D. Cal. 1975) (Orrick, J.) *appeal pending*, 9th Cir. No. 76-1412. Both these decisions found the challenged regulations invalid on constitutional and statutory grounds, both facially and as applied. The only other decision which has directly passed upon the validity of prior restrictions on petitioning activity is *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327 (1975). This court there upheld the regulations as applied in that case, which involved combat zone bases during the Vietnam war. However, the court did note that it "entertain[ed] significant doubts" about the facial validity of the regulations, *id.* at 325, 511 F.2d at 1333.

first amendment analysis, we believe that it is neither necessary nor proper to do so because the validity of the challenged regulations, insofar as they pertain to petitioning activities, can be determined on statutory grounds.

10 U.S.C. § 1034 (1970) provides that

> [n]o person may restrict any member of an armed force from communicating with a member of Congress, unless the communication is unlawful or violates regulations necessary to the security of the United States.

In enacting this statute, Congress has eased the task of the courts in evaluating the validity of military restrictions on the right to petition. The statute not only indicates that free and unrestricted communication by members of the armed forces with the Congress or members thereof is of particular concern to the legislative branch, but also commands that such communication be subject to additional protection beyond that afforded other kinds of speech by the first amendment. Whatever standards may be held to apply generally to restrictions on speech within the military, the standards to be applied to restrictions on petitioning and related activity cannot be less stringent than those provided in § 1034. Thus, the statute represents a legislative evaluation of the competing interest in free expression of views to members of Congress, on the one hand, and the special requirements of the military, on the other. The difficult balancing which would otherwise have to be accomplished by the judiciary has been legislatively resolved: re-

strictions imposed upon lawful communication to Congress must be "necessary" to the national security.

The regulations involved in this case constitute in terms restrictions on communications with members of Congress. The legislative history of § 1034 confirms that Congress sought by this legislation to prohibit military commanders from interfering with communications to members of Congress *in advance* of the actual sending of the communications.[14] A system of prior restraint—as opposed, for instance, to the *post hoc* imposition of penalties for scurrilous, obscene, mendacious, or other improper communications—is precisely what Congress intended to prohibit, subject to the limited exceptions noted in the statute.

The Government contends, however, that the statute quoted above was intended to protect only letters

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[14] The provision was originally enacted in 1951 as an amendment to the Universal Military Training and Service Act. C. 144, § 1(d), 65 Stat. 78. The amendment was offered by Congressman Byrnes of Wisconsin in order to counteract military regulations which required that communications to Congress be sent "through official channels." In support of his amendment, Congressman Byrnes stated:

> I will admit . . . that there is no restriction on [the] right to send communications through channels, but anybody knows that that certainly is a restriction in and of itself.

97 Cong. Rec. p. 3776, April 12, 1951. Minor changes in wording were made when the statute was recodified in 1956. C. 1041, 70A Stat. 80.

by individuals to members of Congress.[15] We think the legislative history indeed leaves no doubt that the right to present a solitary, individual grievance to a member of Congress is encompassed by § 1034.[16] But there is no indication that this is the outer limit of the communication which Congress sought to protect in passing this legislation. We agree with the Secretary of Defense that § 1034 protects also the right to *petition* members of Congress. In a Directive entitled "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," he stated:

> The right of members to complain and request redress of grievances against actions of their commander is protected by Article 138 of the Uniform Code of Military Justice. *In addition, a member may petition or present any grievance to any member of Congress (10 U.S.C. § 1034).*

D.O.D. Directive No. 1325.6, § III G (1969) (emphasis added). We would suppose that quite often a

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[15] The opinion in *Carlson* v. *Schlesinger, supra,* 167 U.S. App.D.C. 325, 511 F.2d at 1333, may also have intimated that § 1034 protects only the right to send individual letters to Congress. While the "national security" exception to the statute may narrow the nature of petitioning activities protected in a combat zone such as was involved in *Carlson,* we do not think and do not read the dicta in *Carlson* as implying that individual letter-writing is the only activity protected under § 1034 at a base such as Iwakuni.

[16] When asked whether the purpose of the amendment was "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator," the sponsor of the amendment replied, "That is right." 97 Cong. Rec. p. 3776, April 12, 1951.

soldier's intended communication with Congress could not effectively be accomplished through solitary letters, as, for instance, when the objective is to communicate widespread dissatisfaction concerning a particular grievance, rather than merely the grievance itself. We also note that the system of prior restraint at issue in this case evidently applies not only to petitions but also to their next of kin, coordinated mailing campaigns utilizing preprinted forms or letters containing identical messages. The distribution of such material would appear to be subject to prior approval.

Particularly in view of the long and cherished tradition in this country, embodied in the first amendment (". . . the right *of the people peaceably to assemble, and to petition Congress* for a redress of grievances"), of collective presentation of grievances to those in authority in the form of petitions, we think it most unlikely that in protecting the right to communicate grievances to Congress, Congress did not intend to protect the right to solicit others to sign such communications.

Having concluded that the petitioning activities restricted in this instance by the challenged regulations are communications to members of Congress within the meaning of § 1034, our next task is to determine whether the system of prior restraint at issue falls within one of the exceptions to the general prohibition of that statute. It is not seriously contended that the materials in issue here were "unlawful," within the meaning of that term as used in § 1034, by reason

of their particular content. The statute also states, however, that prior restraint is not prohibited where the communication thus restricted "violates regulations necessary to the security of the United States." Thus the question we face is whether the regulations requiring prior approval of petitions to Congress on the Iwakuni Air Station are necessary to the security of the United States.

We note that this is not the way that courts in the two other cases involving the facial validity of similar military restrictions on petitions have framed the statutory question before them.[17] Rather than determining whether the system of prior restraint in the particular circumstances before them is within the national security exception to § 1034, these courts have measured the standard of "national security" against the guidelines which armed forces personnel have set down to guide commanding officers in granting or denying requests to distribute. In both this case and the other two cases concerning restraints on petitioning activities, the guidelines essentially state that permission to distribute should be denied if the petition at issue presents "a clear danger to the loy-

[17] *See Allen* v. *Monger, supra* 404 F.Supp. at 1090 (¶ 8); *Glines* v. *Wade, supra* 401 F.Supp. at 130-31. The District Court, however, properly phrased the question as whether "the very system of prior restraints . . . is unconstitutionally restrictive of First Amendment freedoms." 413 F.Supp. at 868.

alty, discipline, morale or safety" of service personnel, or if it advocates unlawful behavior.[18]

The holdings in the other two cases that these guidelines are broader than the statutory national security exception address a question which, in our view, need not be reached. The particular guidelines which armed forces personnel have set down to guide commanding officers in granting or denying requests to distribute assume relevance only if it is first determined that the basic system of prior approval for any petitioning activity is itself "necessary to the security of the United States." *If* this determination were affirmative, *then* we would face the issue of whether the standards set out in the guidelines for rejection of requests are also commensurate with the statutory

[18] Commanders are told to deny permission to distribute if such distribution would

> (1) Materially interfere with the safety, operation, command or control of his unit, or the assigned duties of particular members of the command; or,
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> (2) Present a clear danger to the loyalty, discipline, morale or safety to personnel of his command; or,
>
> (3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates, insubordination, disloyalty, mutiny, refusal of duty, solicits pornographic material, or comprises, advocates, or solicits violation of international treaties or agreements; or,
>
> (4) Involve the planning or perpetration of an unlawful act or acts.

MAWO 5370.1A. Nearly identical guidelines are stated in the other regulations challenged on this appeal. *See also Allen* v. *Monger, supra* 404 F.Supp. at 1086 (¶ 10); *Glines* v. *Wade, supra* 401 F.Supp. at 131.

standard. Refusal to grant a request to distribute is a *second, separate* restriction in addition to the universally applicable restriction which takes the form of a system of prior restraint. We emphasize again that when Congress prohibited restrictions on communications with Congress, it clearly intended this prohibition to apply to a system of prior approval itself.

We conclude that no showing has been made that a system of prior restraint on petitioning activities on the Iwakuni Air Station is necessary to the national security. The findings of the District Court with respect to the nature of the military mission at the base are not extensive, but it is clear that the station is not in an actual and current combat zone. While an affidavit introduced in the Court below states that the base is "combat-ready," there are no combat activities performed by base personnel during peacetime.[19] We understand that order and discipline might be more tightly maintained were commanders given the opportunity to screen petitions prior to their circulation, but we do not think that the national security can be said to require that the objective of military discipline be pursued to the exclusion of all other interests. If this were the case, then § 1034 would be a nullity, for restrictions on petitioning activity, as on other types of speech, can always be said to decrease the possibility of lapses of military discipline. We agree with the District Court that as long

[19] *See* 413 F.Supp. at 867-68.

as the on-base petitioning activity is performed away from restricted or work areas during off-duty hours, there should be no prior approval required for these activities because such approval is not "necessary to the national security."

Our invalidation of the system of prior restraint on petitions to Congress at the Iwakuni Air Station does not leave military commanders without recourse against service personnel who initiate petitions which prove to be improper in their content. *See* p. —— of —— U.S.App.D.C., p. 912 of 575 F.2d supra. Those who undertake such petitioning may be punished under applicable provisions of the Code of Military Justice or under applicable criminal law. It is the system of prior restraint on petitions to Congress which is incompatible with § 1034.

III

The Government has strenuously argued that this case is controlled by the Supreme Court's decision in *Greer* v. *Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed. 2d 505 (1976). We respond to this argument at some length because we think it is based on important misconceptions about the scope of the holdings in that case. The major portion of the *Greer* opinion related to the holding that the absolute ban on political demonstrations at Fort Dix, New Jersey was constitutionally permissible, a holding not directly relevant to the statutory issue before us relating to the petitioning Congress. However, *Greer* also held that the first amendment rights of the civilian plaintiffs were

not violated by another regulation which prohibited them from distributing political campaign literature at the base without prior command approval. Because the plaintiffs in *Greer* had not presented their literature for prior approval, the Court did not face the issue of whether the regulation was constitutional as applied; rather, the Court held that the challenged regulation was not facially invalid, *id.* at 838-840, 96 S.Ct. 1211.

The regulation in *Greer* authorizing prior restraint read as follows:

> The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person . . . is prohibited on the Fort Dix Military Reservation without prior approval . . . .

Id. at 831, 96 S.Ct. at 1214. The quidelines governing command refusal of requests to distribute were in all relevant aspects identical to those in the case before us, *see id.* at 831, 96 S.Ct. 1211 n. 2.

We find *Greer* neither controlling nor persuasive with respect to the issue of the validity of the regulations implementing a system of prior restraint on petitions at the Iwakuni Air Station. Most significantly, of course, the holding in *Greer* was constitutionally based. The *Greer* Court had no occasion to consider the validity of that prior restraint regulation under § 1034 because petitions to Congress were not involved in *Greer*. The Court's statement that "nothing in the *Constitution* . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command," *id.* at 840, 96 S.Ct. at 1218 (emphasis added),[20] is therefore fully consistent with our conclusion that prior restraints on all petitioning activities at a base such as Iwakuni is violative of § 1034.

Moreover, even apart from the fact that the decision we now make is statutorily based, the above-quoted statement is consistent with our holding because, as earlier noted, commanders remain free to punish—and thus deter—petitioning activities which are unlawful or otherwise inconsistent with the military mission. We have held only that at a base such as Iwakuni commanders are not free to use a system of prior restraints to inhibit such activities; they remain free to do so in other ways.[21]

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[20] It may be that this statement is not even the basis for the holding of constitutional validity. In *Greer* those who sought to distribute materials were civilians, and the Court cited the "historically unquestioned power of [a] commanding officer summarily to exclude civilians from the area of his command" (*Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)) in concluding that "respondents, therefore, had no generalized constitutional right to . . . distribute leaflets at Fort Dix." *Greer* v. *Spock*, 424 U.S. at 838, 96 S.Ct. at 1217.

[21] Elsewhere in its opinion, the *Greer* Court was at pains to stress the particular need for discipline at a basic training camp such as Fort Dix. It may well be that this need is sufficient to allow a general system of prior restraints which would be unconstitutional at a base such as Iwakuni. *Cf.* note 15 *supra*.

We also note that, even if we were to decide the issue before us on constitutional grounds, it is not clear that *Greer* would be controlling. Careful study of the regulation at issue in *Greer* leaves uncertain the question of whether or to what extent it in fact restricts petitioning activities. Although petitions could conceivably be encompassed within the term "other writings," it is not at all clear that solicitation of signatures is encompassed by the specific activities proscribed: "distribution" or "posting." In any event, the *Greer* regulation is obviously not directed at petitioning activities in the significant way that the regulations in this case are. The Supreme Court has previously enunciated the judgment that a statute should not be struck down as facially invalid simply because it potentially touches upon constitutionally protected activity at the margin. *Parker* v. *Levy*, *supra* 417 U.S. at 760, 94 S.Ct. 2547. Thus the Court's decision to uphold the regulation in *Greer* need not imply that the regulation would be constitutional if applied to petitioning activities.

Section 1034 is an exercise by Congress of its constitutional power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S.Const. art. I, § 8, cl. 14. In doing so Congress may, of course, elect to provide rights and privileges extending beyond those minimally guaranteed by the Constitution. Whatever the reach of that guarantee may be in a base of this kind, it is plainly evident that Congress in enacting § 1034 has been motivated by a purpose to strengthen, and not to limit, the first

amendment rights of petition in the case of service personnel. It is, in any event, the statutory standard to which we look in determining the validity of the service regulations challenged in this case; and we find these regulations wanting insofar as they deal with petitioning activity directed to members of Congress.

We remand the case to the District Court with directions to revise its judgment in the manner indicated herein.

It is so ordered.

TAMM, Circuit Judge, concurring in part and dissenting in part:

I concur in Judge McGowan's well-written and very careful opinion insofar as it vacates the portion of the district court's judgment that extends to materials unrelated to the petitioning process. However, because I am unable to agree with the conclusions and result he reaches concerning multi-signature petitions addressed to Congress by members of the armed forces, I must respectfully dissent from that part of his opinion.

I

By exercising an appropriate degree of judicial restraint, Judge McGowan has written a very narrow opinion based solely on statutory grounds. The result he reaches follows from two conclusions: first, that a petition, signed by more than one individual, addressed to a senator or representative by a member of the armed forces, is a protected communication under 10 U.S.C. § 1034 (1970); and second, assuming such a petition is protected, that regulations requiring prior approval of the petition by appropriate military authority are not necessary to the security of the United States. I disagree with both of these conclusions. Prior to commenting on them, however, a few preliminary remarks are in order.

We must not lose sight of the fact that this case arises from events that occurred in a purely military environment. Both the Congress and the Supreme Court have long recognized that "the military is, by

necessity, a specialized society separate from civilian society." *Parker* v. *Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974); *see Orloff* v. *Willoughby*, 345 U.S. 83, 94, 73 S.Ct. 534, 97 L.Ed. 842 (1953). For example, the Congress has made it a felony to urge or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the armed forces. *See* 18 U.S.C. §§ 2387-2388 (1970). Similarly, the Court has often indicated its awareness of the military's need for "a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757, 95 S.Ct. 1300, 1330, 43 L.Ed.2d 591 (1975); *see Greer* v. *Spock*, 424 U.S. 828, 848, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (Powell, J., concurring); *Burns* v. *Wilson*, 346 U.S. 137, 140, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953) (plurality opinion). I mention these well-accepted propositions to illustrate my belief that legislative and judicial actions that seek to limit a military commander's disciplinary prerogatives should be only as intrusive as is necessary to accomplish the effect desired.

II

Consistent with the foregoing premise, I believe that laws affecting military discipline should be interpreted as narrowly as possible, because an expansive reading of such statutes may circumscribe the authority of military commanders to an extent never intended by Congress. In my opinion, the court's conclusion in this case that petitions are protected com-

munications under 10 U.S.C. § 1034 clearly goes beyond what Congress intended when it passed that statute.

An objective reading of the legislative history demonstrates that the *sole* purpose in enacting 10 U.S.C. § 1034 was to ensure that an *individual* member of the military could, at any time, write to his senators or representative without being required to have the communication proceed through command channels. The sponsor of the amendment, Congressman Byrnes of Wisconsin, introduced the measure because of an incident in which an *individual* sailor desired to communicate with Mr. Byrnes about a personal grievance and was "told by his commanding officer aboard ship that a direct communication with his Congressman was prohibited and it would make him subject to a court-martial." 97 Cong.Rec. 3776 (1951). As the majority notes, in a somewhat offhand fashion, *see* Majority opinion, *supra* at —— of ——U.S.App.D.C., at 912 of 575 F.2d n.16, when Mr. Byrnes was asked whether "the purpose [of the amendment was] 'to permit *any man* who is inducted to sit down and take a pencil and paper and write to *his* Congressman or Senator'," he replied, "That is right." 97 Cong. Rec. 3776 (emphasis added). Later, the chairman of the committee responsible for the legislation, Mr. Vinson of Georgia, reiterated that the amendment was intended "to let *every man* in the armed services have the privilege of writing *his* Congressman or Senator on any subject if it does not violate the law or if it does not deal with some secret

matter." *Id.* at 3877 (emphasis added). If one construes the statute strictly, therefore, as it most certainly ought to be construed, it is apparent that individual communications with senators or representatives were indeed intended to be "the outer limit of the communication which Congress sought to protect in passing this legislation." *See* Majority opinion, *supra* at —— of —— U.S.App.D.C., at 912 of 575 F.2d; *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327, 1333 (1975).[1]

The soundness of this conclusion is even more apparent when one considers a directly analogous statute, enacted almost forty years *before* 10 U.S.C. § 1034, which illustrates that Congress had no difficulty in employing unequivocal language when it did intend that multi-signature petitions be included within the protective ambit of a statute. Entitled "Right to *petition* Congress; employees," 5 U.S.C. § 7102 (1976) states (emphasis added): "The right of [civil service] employees, *individually or collectively, to petition Congress* or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." Section 1034, on the other hand, makes no mention of the key words "petition"

[1] This construction of 10 U.S.C. § 1034 is entirely consistent with DOD Directive No. 1325.6 § III G (1969), Joint Appendix (J.A.) at 65-69. A petition can be signed either by one person or by many persons. The wording of the directive (emphasis added)—"*a member may petition* or present any grievance to any member of Congress . . ."—indicates that "petition" is being used in the singular sense in that document.

or "collectively," and I hardly think that we should read into that statute something Congress clearly did not intend to be included.

The wisdom of Congress in not extending the protection afforded to petitions by civil service employees to petitions by members of the military is evident. The overt acts required to generate a petition, while only mildly disruptive to the tasks performed by civil service employees if done during off-duty hours, could be very harmful to military discipline and morale. In this case, appellees desired to canvass virtually every off-duty area of the base—including barracks, the base exchange, and the enlisted men's club [2]—in an effort to gain support for their petitions. I find it difficult to believe that Congress intended the narrow language of 10 U.S.C. § 1034 to afford blanket protection to these activities, since such protection necessarily strips the local commander of even the very limited right of prior review sought by the regulations under scrutiny here.

III

Even assuming *arguendo* that multi-signature petitions are covered by 10 U.S.C. § 1034, I disagree with the conclusion that the regulations that provide for a system of prior review of petitioning activities on the Iwakuni Air Station are not "necessary to the security of the United States." The linchpin of the majority's argument in favor of this conclusion is that

[2] J.A. at 4; Record entry 17, at 5.

the Iwakuni Air Station is "not in an actual and current combat zone," [3] as was the case in *Carlson* v. *Schlesinger*. It also appears that the majority would have been more sympathetic to the regulations had they been applied at a "basic training camp," as in *Greer* v. *Spock*.[4] I find these distinctions to be untenable.

Our first President, who was intimately familiar with the horrors of armed conflict, once remarked that the most effective means of securing peace is to be prepared for war. This same theme was echoed by the Supreme Court in *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955) (emphasis added): "[I]t is the primary business of armies and navies to fight *or be ready to fight* wars should the occasion arise." The Congress, too, has recognized the inseparability of the military's responsibility both to wage and to be prepared to wage wars, by imposing similar sanctions on those who attempt to cause insubordination by members of the military whether during peacetime or during war. *Compare* 18 U.S.C. § 2387 (1970) *with id.* § 2388.

An affidavit submitted in the district court by a former commanding general at Iwakuni [5] indicates

[3] Majority opinion at —— of —— U.S.App.D.C., at 914 of 575 F.2d; *see* Memorandum opinion of May 21, 1976, J.A. at 83.

[4] Majority opinion at —— of —— U.S.App.D.C., at 915 of 575 F.2d n.21.

[5] J.A. at 70-74. The district judge's characterization of this document as a "post hoc" rationalization, J.A. at 83 n.12, is

that the regulations under scrutiny in this case were promulgated with one goal in mind: to assist the local commander in accomplishing his assigned mission of having his command prepared to react immediately or on very short notice, a mission we have previously denominated as "a strong national interest." *Hess* v. *Schlesinger*, 159 U.S.App.D.C 51, 486 F.2d 1311, 1312 (1973). I quote at length from this affidavit to illustrate how little difference there is between being stationed at Tan Son Nhut Air Base in Vietnam in 1971, as in *Carlson*, and being stationed at Iwakuni Air Station in Japan, either today, or in 1974 when the relevant actions commenced:

> The First Marine Aircraft Wing, its personnel and equipment, is constantly maintained in a high degree of readiness for possible combat deployment on extremely short notice. For example, in early 1972, units of the First Marine Aircraft Wing stationed at Iwakuni, deployed to

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very puzzling and somewhat troubling. At the time of the affidavit, the affiant had been in the Marine Corps for 35 years, had commanded Iwakuni Air Station for over a year just two years before, and was serving as Chief of Staff of the Marine Corps. It is hard to imagine anyone more qualified to set forth matters of significant value to the trier of fact, and yet it is obvious that the affidavit was accorded little, if any, weight by the judge below. The case cited in support of this approach, *Hess* v. *Schlesinger*, 159 U.S.App.D.C. 51, 486 F.2d 1311 (1973), is hardly apposite. Indeed, the affidavits in *Hess* were found to be insufficient to support a summary judgments precisely because military *lawyers* rather than military *commanders* were making judgments concerning the efficiency of units at Iwakuni in certain deployment scenarios. That deficiency is not present in the instant case.

> combat bases in Vietnam and Thailand within 24 hours of receiving notice. Later, during the spring of 1975, elements of the First Marine Aircraft Wing were rapidly deployed to assist in the evacuation of Phnom Penh and Saigon. At any time, the Wing may again be called upon to deploy under similar circumstances on a moment's notice. In this eventuality, the highest degree of loyalty, discipline, and morale will be necessary for the successful completion of the mission.
>
> Personnel who are constantly prepared for deployment into combat or a crisis situation must at all times have the same strict discipline and high morale as would troops in actual combat situations. A well-trained and disciplined Marine, when considering the mission of the supporting units, must be prepared for instantaneous deployment for such contingency operations, ranging from protection/evacuation to combat operations. The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. . . . These traits must be inherent in each Marine before he goes into combat and not a learning process reserved for the actual battlefield. Individual or collective efforts by those who would attempt, consciously or otherwise, to undermine good order, discipline, loyalty, and morale, cannot be tolerated. Therefore, the regulations under challenge in this lawsuit, which afford a Commander the ability and authorization to screen such printed material prior to its distribution, are in keeping with the

requirement for the safety and well-being of his troops.[6]

These comments, and those previously cited sentiments of support from all three branches of government, convince me that those regulations establishing a system of prior review of petitioning activities at Iwakuni most certainly are "necessary to the security of the United States." Only the local commander has the ability and expertise necessary to assess the effect of such activities on the combat readiness of his command, *see Schneider* v. *Laird*, 453 F.2d 345, 347 (9th Cir. 1972) (per curiam); *Yahr* v. *Resor*, 431 F.2d 690, 691 (4th Cir. 1970) (4th Cir. 1970) (per curiam), and thus a *limited* right of prior review should be left to him. I stress the word "limited," for, as noted by the majority, the Government has conceded that the military authorities acted improperly in denying the requests in issue here. Thus, in future cases, only those very few petitioning activities that are beyond this rather high threshold would be subject to circumscription.[7] Rather than totally usurping

[6] J.A. at 73-74.

[7] I believe that DOD Directive No. 1325.6, *supra* note 1, and regulations promulgated thereunder, J.A. at 51, 54, 58 & 61-62, furnish the proper standard to be employed by the local commander:

> It is the mission of the Department of Defense to safeguard the security of the United States. *The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security.* On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible Commander.

J.A. at 65 (emphasis added). *See also id.* at 52; Majority opinion at ——-—— of —— U.S.App.D.C., at 913-914 of 575 F.2d & n.18.

The presumption *against* prohibition of petitioning activities in made even stronger by provisions of the implementing regulations that require a commander who prohibits such activities to report this fact immediately to his superior officers. *See* J.A. at 60, 63. *See also id.* at 64. Since any of these superiors has the authority to reverse the commander's prohibition decision, there thus exists a further safeguard against arbitrary application of the regulations. *See Greer* v. *Spock*, 424 U.S. 828, 831-32 n.2, 840, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976).

[8] The suggestion by the majority that post hoc legal action leaves the commander with a means to deter petitioning activities that are unlawful or otherwise inconsistent with the military mission is unpersuasive. Majority opinion at ——, ——, ——-—— of —— U.S.App.D.C., at 912, 914, 915 of 575 F.2d. If a petitioning activity is indeed punishable, the harm to the unit's mission will have been done before legal proceedings can be instituted, and long before the proceedings are completed. Given the quick-reaction nature of the Iwakuni mission, a legal recourse alternative is of little practical value to the commander.

the local commander's authority in this regard, as the majority opinion has done,[8] I would prefer to repose confidence in the commander to review petitions in a reasonable and fair manner; this proposition is simply a corollary to that which expresses confidence in him to do his part in securing our Nation.

IV

In summary, I would hold that multi-signature petitions are not protected communications under 10

U.S.C. § 1034, and, alternatively, that the regulations in issue here are proper because they are necessary to the security of the United States. In so holding, we would properly honor "the sound and established principle that it is not the business of the courts to run the military." *Vander-Molen* v. *Stetson*, —— U.S.App.D.C. ——, ——, 571 F.2d 617, 629 (1977) (Robb, J., dissenting). I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 75-0043

FRANK L. HUFF, ET AL., PLAINTIFFS

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS

May 21, 1976

MEMORANDUM OPINION

PARKER, District Judge.

This proceeding presents questions for judicial determination regarding the limit and scope of constitutional rights afforded to members of the military, a subject which the courts have frequently considered in recent years. Here, three individual plaintiffs, on behalf of themselves and other members of the Marine Corps stationed at, assigned to or on duty at the Marine Corps Air Station at Iwakuni, Japan, challenge certain regulations which require prior command approval for distribution of written material by military personnel. They seek declaratory and injunctive relief against the Secretary of the Navy and certain military officers with respect to the implementation and enforcement of the regulations.

The Court is called upon to resolve cross-motions for summary judgment and, having considered the

memoranda of counsel, affidavits, exhibits, oral argument, and the entire record, concludes that plaintiffs' motion should be granted in part and denied in part, for the reasons which follow.

First Amendment in the Military

In *Parker* v. *Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), the Supreme Court left no doubt as to the guiding principle to be observed:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it. 417 U.S. at 758, 94 S.Ct. at 2563, 41 L.Ed.2d at 459.

Despite the tone of this oft-quoted passage, many jurists have questioned this generaliaztion and have taken the view that the mandates of the Constitution are fully applicable to the military, and would place the burden of justification upon those attempting to restrict freedom of expression. As Supreme Court Justice William J. Brennan recently noted:

> . . . the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security. . . . In all cases where such interests have been advanced, the inquiry has been whether the exercise of First Amendment rights necessarily must be circumscribed in order to secure those interests. *Greer* v. *Spock*, —— U.S. ——, 96 S.Ct. 1211, 1224, 47 L.Ed.2d 505, 523, 44 U.S.L.W. 4380, 4388 (1976) (Brennan, J., dissenting).

The view that an assertion of constitutional rights is a threat to discipline and morale in the military has been sharply questioned. Perhaps encouragement of more freedom of thought would have sparked recognition of unlawful orders in the Vietnam War, and prevented atrocities such as the massacre of civilians at My Lai. Scientific studies have also pointed out that too much discipline among service personnel can lead to increased susceptibility to brainwashing techniques while in captivity.[1] The military, too, are members of the American society where freedom of expression is a key value, and they are fully capable of reconciling a dissenting personal viewpoint with a duty to obey the law. This was clearly recognized by Chief Judge David Bazelon when he wrote:

> . . . soldiers like other citizens can disagree with governmental policy and yet still realize that they must follow the legal requisites of that policy, including military service, until the policy is changed by democratic means. *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327, 1337 (1975) (Bazelon, dissenting).

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[1] Note, "Military Discipline and Political Expression: A New Look at an Old Bugbear," 6 *Harv.Civ.Rights-Civ.Lib.L. Rev.* 525, 541 (1971).

Thus, in examining the facts and issues in this proceeding, the Court will assume that constitutionally guaranteed liberties are to be respected, unless there is a demonstrated need which justified military restrictions on free expression.

Factual Background

The plaintiffs Frank L. Huff, Robert A. Falatine, and Robert E. Gabrielson allege that while stationed at the Marine Corps Air Station, Iwakuni, Japan, they were unlawfully denied permission to circulate petitions to Congress and to distribute certain printed material, both on and off base. Early in the proceedings the matter was certified as a class action "on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan." [2]

The plaintiffs' purpose in bringing this class action was to challenge the validity of the regulations which required them to obtain permission to distribute the written materials in question. The questioned regulations [3] provide in pertinent part as follows:

> 5.2(2) No member of this command will originate, sign, distribute, or promulgate petitions,

[2] Order filed July 17, 1975, pursuant to Rule 23(a) Fed.R. Civ.P.

[3] First Marine Aircraft Wing Order 5370.1A, replaced by 5370.1B and Marine Corps Air Station (Iwakuni, Japan) Order 5370.3A, replaced by 5370.3B; Fleet Marine Force Pacific Order 5370.3 and Commander-In-Chief, Pacific Fleet Instruction 5440.3C, all of which contain essentially the same provisions.

> publications, including pamphlets, newspapers, magazines, handbills, fliers, or other similar printed or written materials on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, or aboard any military installation, while in a duty status or non duty status, in uniform or out of uniform, or anywhere within a foreign country, regardless of uniform or duty status unless prior command approval is obtained. 5.c. . . . Commanders will control or prohibit the unauthorized activities described, if, in their judgment activity would,
>
> (1) Materially interfere with the safety operation, command or control of his unit, or the assigned duties of particular members of the command; or,
>
> (2) Present a clear danger to the loyalty, discipline, morale or safety to personnel of his command; or,
>
> (3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits pornographic material, or comprises, advocates, or solicits violation of international treaties or agreements; or,
>
> (4) Involve the planning or perpetration of an unlawful act or acts.

(hereinafter "the regulations").

The defendants are the Secretary of the Navy and military officers [4] responsible for prescribing and administering the regulations.

[4] Commandant of the Marine Corps, Commander-in-Chief U.S. Pacific Fleet, Commanding General Fleet Marine Force

Plaintiffs seek by this action: (1) a declaration that the regulations are unconstitutional on their face or as applied in violation of the First and Fifth Amendments to the United States Constitution, 10 U.S.C. § 1034 [5] and pertinent Marine Corps guidelines (hereafter "guidelines"); [6] (2) an injunction and mandamus order restraining defendants from continuing to deny plaintiffs their rights; and (3) invalidation and expungement of plaintiff Huff's conviction and plaintiff Falatine's arrest for violating said regulations, and restoration of all pay, benefits and rank of which Huff was deprived as a result of said conviction.

Specific Actions Taken Against The Individual Plaintiffs

Their complaint revolves around four specific denials of requests to circulate written materials and one incident where two of the plaintiffs were arrested for circulating a letter without requesting approval.

Pacific, Commanding General First Marine Aircraft Wing and Commanding Officer U.S. Marine Corps Air Station.

[5] The text of 10 U.S.C. § 1034 in its entirety reads as follows:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

[6] Department of Defense Directives 1325.6 and 1344.10; OPNAV Instruction 1620.1 and MCO 5370.4. The basic policy expressed in the guidelines is that "the service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security." DOD Directive 1325.6, Part II.

On May 2, 1974, plaintiff Huff requested permission to distribute both on and off base, a petition to Senator Alan Cranston regarding the use of members of the military and the National Guard in labor disputes, and copies of an article on the use of Article 138 of the Uniform Code of Military Justice.[7] Permission was denied by the Commanding General, on the basis that the petition contained "gross misstatements and implications of law and fact as well as impugning by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces in the exercise of his constitutional responsibilities."

On May 8, 1974, plaintiff Falatine requested permission to distribute for signatures a petition, either on or off base, to Congressman Ronald Dellums supporting amnesty for Vietnam War resisters. His requests were denied for the same reasons the Huff request was denied.

On June 24, 1974, both Falatine and Huff requested permission to circulate copies of a leaflet entitled "We Hold These Truths To Be Self-Evident (But Do the Brass?)" containing the Declaration of Independence and the First Amendment to the Constitution, with commentary. Huff requested permission to distribute the leaflet off-base while Falatine's request was for on-base circulation. Huff's off-base request was granted, but Falatine's on-base proposal was denied because the leaflet's introductory paragraph was

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[7] Article 138, 10 U.S.C. § 938, provides for the filing of complaints by armed forces personnel against a commanding officer.

deemed to be "by transparent implication, disrespectful and contemptuous of all of your superiors, officers, noncommissioned officers and civilians alike."

On July 12, 1974, these two plaintiffs and several other Marines were displaying outside the main gate of the Air Station, a copy of a letter to Senator J. William Fulbright concerning United States support for the government of South Korea. They were immediately arrested for unauthorized distribution of written materials in violation of the regulations. Huff was court-martialed, sentenced to 60 days at hard labor, forfeiture of half-pay, and reduction in rank from E-3 to E-1, the lowest enlisted grade. Court-martial proceedings against Falatine were dismissed due to lack of evidence, but his arrest still appears as a part of his military record.

Subsequent to the arrests of Huff and Falatine, plaintiff Gabrielson requested permission to distribute the same Fulbright letter as well as a statement concerning the July 12 arrests of Huff, Falatine and other. Gabrielson was given permission to distribute the letter and accompanying statement on base, but not in the barracks, on the condition that no argument or debate of the issue would accompany the distribution. Permission to circulate the materials outside the main gate of the base was denied, however, because it would constitute "a form of political activity within the host country" in violation of the Status of Forces Agreement between the United

States and Japan.[8] Both Huff and Falatine also requested permission to circulate the petition and leaflet, and their requests were also granted for on-base distribution only.

Plaintiffs argue that despite the special constitutional restrictions imposed by virtue of the military situation, they are nonetheless entitled to have the regulations at issue here invalidated both on their face and as applied to plaintiffs in the instances detailed above.

Facial Validity of the Regulations

The Marine regulations applied against these plaintiffs are nearly identical to the Air Force regulations requiring prior approval for distribution of publications that were discussed in *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327 (1975). Although the majority in *Carlson* "entertain[ed] significant doubts about the breadth and scope of the regulations," they did not reach the facial validity issue because the regulations were upheld as applied to servicemen who sought to distribute anti-war materials in a combat zone. The Supreme Court, however, recently held that Army regulations requiring prior approval for on-base distribution of political mate-

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[8] Article XVI of the Status of Forces Agreement between the United States and Japan reads as follows:

> It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of Japan and to abstain from any activity inconsistent with the spirit of this Agreement, and, in particular, from any political activity in Japan.

11 U.S.T. 1664, T.I.A.S. 4510.

rials "are not constitutionally invalid on their face." *Spock* v. *Greer*, *supra*, —— U.S. at——, 96 S.Ct. at 1217, 47 L.Ed.2d at 514, 44 U.S.L.W. at 4383. The standards for disapproval, "clear danger to the loyalty, discipline or morale of the troops" were also approved in the *Spock* ruling. Therefore, this Court must carefully examine the circumstances under which the restrictions were applied to plaintiffs and determine whether military necessity warranted the particular applications of the regulations in this case.

Validity of Regulations As Applied On-Base

The general rule in this Circuit is that the Supreme Court's constitutional standards shall govern "unless it is shown that conditions peculiar to military life require a different rule." *Kauffman* v. *Secretary of the Air Force*, 135 U.S.App.D.C. 1, 415 F.2d 991, 997 (1969), *cert. denied* 396 U.S. 1013, 90 S.Ct. 572, 24 L.Ed.2d 505 (1970). The task of this Court, therefore, is to "strike the proper balance between legitimate military needs and individual liberties." *Carlson*, *supra*, at 1331.[9] The *Carlson* majority held that the requirement of absolute discipline in a combat mission fully justified the prior approval requirement for circulating petitions. Likewise, in *Spock* it was held that prior approval for on-base distribution of political literature at Fort Dix, New Jersey was valid because of the "military interest in preserving a

[9] *See also, Glines* v. *Wade*, 401 F.Supp. 127, 130 (N.D. Cal. 1975) ("the latitude to be permitted in prescribing regulations varies with the magnitude of the governmental or military interest involved.")

relatively isolated sanctuary" during the basic training period,[10] and the maintenance of "a politically neutral military establishment under civilian control" which is "wholly free of entanglement with partisan political campaigns of any kind." [11]

In the present case, however, prior approval was required for on-base distribution among servicemen of petitions to Congress and other materials on political topics of interest to United States citizens. The base in question is located in Japan, and although it may be "combat-ready" [12] this is clearly not a combat zone case as in *Carlson*. Nor are the Marines at Iwakuni involved in basic training, as in *Spock* where separation from the political sphere was deemed to be of particular importance.[13] On the contrary, Amer-

[10] Spock, *supra*, at ——, 96 S.Ct. at 1223, 47 L.Ed.2d at 521, 44 U.S.L.W. at 4384 and 4386 (Powell, concurring).

[11] *Id.*, at ——, 96 S.Ct. at 1218, 47 L.Ed.2d at 515, 44 U.S. L.W. at 4383 (majority opinion).

[12] Affidavit of Lt. Gen. Leslie E. Brown, U. S. Marine Corps, filed as defendant's Exhibit A.

This "post-hoc" litigation affidavit attempts to rationalize the broad sweep of these regulations as applied to limited on-base activities by relying on the fact that Marines at Iwakuni must be prepared for deployment into combat at any time. A similar affidavit prepared to justify another Iwakuni regulation restricting individual liberties was held by our Circuit Court to be insufficient to foreclose discussion of the opposing factual claims raised by plaintiffs. *Hess* v. *Schlesinger*, 159 U.S.App.D.C. 51, 486 F.2d 1311 (1973).

[13] Defendants also rely on the case of *Committee for GI Rights* v. *Callaway*, 171 U.S.App.D.C. 73, 518 F.2d 466 (1975). The "poster regulation" prohibiting display of posters on barracks walls without prior command approval was upheld in

ican servicemen stationed in a foreign country have even less access to information and ideas concerning domestic politics than the soldiers in boot camp who are free to attend rallies and receive information from civilian, off-base sources. Therefore, the need to assure a free flow of information and ideas is crucial in the foreign base situation.

In addition, three of the four publications involved in this case were petitions or letters addressed to members of Congress. The right to petition the government for redress of grievances is specifically guaranteed by the First Amendment. Congress has provided special protection of the serviceman's rights in this area, by the enactment of 10 U.S.C. § 1034.[14]

The standards used in the incidents cited by plaintiffs, however, meet neither the constitutional[15] nor the Congressional standard. For instance, plaintiff Huff's request to distribute for signatures in his barracks a petition to Senator Allan Cranston regarding the use of the military and National Guard in labor disputes was denied because it contained "gross mis-

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the context of an overall drug abuse program instituted by the Army in response to a drug problem on European Army bases. The situation at Iwakuni is thus not comparable.

[14] *See* note 5, *supra*.

[15] In *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), the Supreme Court held that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional." *Id.* at 150-51, 89 S.Ct. at 938, 22 L.Ed. 2d at 167.

statements . . . impugning by innuendo the motives and conduct of the Commander-in-Chief. . . ." Plaintiff Falatine's request to distribute a petition addressed to Congressman Ronald Dellums in support of amnesty for Vietnam War resisters was denied for the same reason Huff's petition was denied. Finally, Falatine's request to distribute on-base a leaflet commenting on the Declaration of Independence and the First Amendment was denied because "the introductory paragraph is, by transparent implication, disrespectful and contemptuous of all your superiors, officers, noncommissioned officers and civilians alike." Plaintiff Huff's request to distribute the same leaflet off-base, however, was granted simultaneously with the denial of Falatine's request.

It is clear to this Court from these undisputed facts that plaintiffs' requests were denied on the basis of the *content* of the petitions and leaflets, rather than legitimate military security requirements. Indeed, defendants conceded in their memorandum of points and authorities (at p. 3) that in all three of these instances, the denials were based on criteria other than "clear danger to loyalty, discipline and morale" or material interference with the accomplishment of the mission, as set forth in the regulations.

In this Court's opinion, not only were the denials arbitrary misapplications of the regulations, but the very system of prior restraints for serviceman-to-serviceman distribution of materials on-base during off-hours and away from restricted or work areas, is unconstitutionally restrictive of First Amendment freedoms.

Two other district courts have recognized the right of military personnel to distribute written materials among themselves, without first securing prior clearance from a commanding officer. In *Glines* v. *Wade*, 401 F.Supp. 127 (N.D.Cal. 1975), the Court held that comparable Air Force regulations were unconstitutional as applied to petitioning activities which occurred during a routine training flight to Anderson Air Force Base in Guam. The *Glines* case held that the military interest in restricting distribution of petitions during peacetime in a non-combat area was "relatively insubstantial." *Id.* at 130. There is a chilling effect involved in requiring prior approval for distribution in situations where the threat to security is minimal, which is "particularly apparent in a military setting, where petitions addressed to members of Congress are very likely to involve complaints about military policies or about the administration of military affairs by superior officers." *Id.* at 131.

Similarly, in *Allen v. Monger*, 404 F.Supp. 1081 (N.D. Cal. 1975), enlisted members of the United States Navy stationed on two aircraft carriers sought to distribute petitions to Congress concerning objections to assignments in the Far East. The District Court in California held that the Naval Regulations requiring prior approval of on-ship distribution of petitions to Congress constituted an overbroad prior restraint on protected activities and as such, were unconstitutional. The requirement of prior approval might well deter some persons from circulating legiti-

mate petitions out of "real or imagined fear of reprisal." *Id.* at 1087. The *Allen* opinion went on to hold, however, that while pre-screening of petitions to be distributed on board ship is unconstitutional outside a combat area, the Navy may issue regulations concerning the time, place and manner of distribution.

Likewise, in this case, the military interest in restricting on-base distributions among service personnel in a non-combat area is minimal, and is outweighed by the individual's interest in free speech. Establishing lines of communication among servicemen is especially important on bases in foreign countries which may have more restricted access to civilian sources of ideas than their counterparts in the States.

Of course, as it was pointed out in the *Carlson* case, military officials may regulate the "time, place and manner" of First Amendment activity. 511 F.2d at 1331. The regulations in this case, however, require prior command approval for all distributions and thus unduly restrict First Amendment activity without the requisite showing of military need. Therefore, the regulations are unconstitutional as applied to on-base distribution of written materials. Regulations which allowed such activity without prior approval only during off-hours and in recreational or public areas of the base would, of course, be reasonable.

Validity of Regulations As Applied Off-Base

Off-base petitioning presents a somewhat different problem due to unique conditions prevailing for American armed service personnel stationed in foreign countries. As mentioned above, the political activities of Marines at Iwakuni are restricted by the Status of Forces Agreement[16] which prohibits members of the United States Armed Forces from engaging in any political activity in Japan.

Two instances of off-base petitioning are involved in this case, which the government alleges were prohibited by virtue of the Agreement. On July 12, 1974, Huff and Falatine were arrested by military police, while circulating off-base a letter to Senator Fulbright protesting United States support of South Korea. Huff was court-martialed and convicted but the charges against Falatine were dropped. In late July and early August, 1974, all three plaintiffs requested permission to distribute the same letter and a statement regarding the previous arrests. Permission was granted as to on-base distribution, but denied for off-base.

Since the political activities of the Marines are restricted by an international agreement, it is not unreasonable to require prior approval for off-base petitioning. In this area, the military has demonstrated a substantial interest in pre-screening written materials, just as they were able to demonstrate a special interest in regulating petitioning in combat zones,

[16] *See* note 8, *supra*.

Carlson, *supra*, and in boot camp, *Spock*, *supra*. Judge John Pratt of this Court recently ruled that "the exigencies and considerations attendant to service in a foreign country" justified a prohibition against demonstrations by members of the armed forces while serving abroad. *Culver* v. *Secretary of the Air Force*, 389 F.Supp. 331, 334 (D.D.C. 1975) (off-base demonstration).

The letter to Senator Fulbright was concerned with an issue which was very controversial in internal Japanese politics at that time. Two Japanese students were facing courts-martial in South Korea, and demonstrations were taking place in Japan to protest the policies of the South Korean president.[17] Thus, the Commanding General who denied permission for off-base distribution had a valid basis for doing so because, under the circumstances, the letter and accompanying statement could have been interpreted to be a form of interference in internal Japanese politics. The effect of the off-base prohibition was also alleviated by the fact that plaintiffs were allowed to distribute their petitions within the boundaries of the American military base, so that an alternate forum was provided in which plaintiffs could reach their fellow Marines.

The prior approval restriction on off-base distributions is constitutional because of the military's need

[17] These manifestations of Japanese involvement and concern regarding the policies of the South Korean government were mentioned in the Fulbright letter and accompanying statement. *See* Defendants' Exhibit F, nos. 61 and 62. *See also* newspaper articles contained in Defendants' Exhibit J.

to assure that international agreements are obeyed. Thus, it would be inappropriate for this Court to overturn plaintiff Huff's conviction or to expunge the arrest records of Huff and Falatine, who were arrested for *off-base* distribution without prior approval. Had they been arrested within the gates of the Marine base, or had the military officials failed to provide an alternate on-base forum for expression in this instance, then the case for expungement would have been stronger. Under the present state of the law, however, courts cannot order expungement for an admitted violation of a constitutionally valid regulation.[18]

Counsel for the plaintiffs will submit an appropriate order in conformance with the foregoing opinion by May 26, 1976.

[18] In *Sullivan* v. *Murphy*, 156 U.S.App.D.C. 28, 478 F.2d 938, 968, *cert. denied*, 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973), our Circuit Court held that expungement of arrest records was an "appropriate remedy in the wake of police action in violation of constitutional rights." It follows that this remedy is inappropriate where plaintiffs have failed to show a constitutional violation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

Civil 75-0043

[Filed March 15, 1978]

No. 76-1828

PRIVATE FRANK L. HUFF, ET AL.

v.

SECRETARY OF THE NAVY, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

Before: McGOWAN, TAMM and ROBINSON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed in part, and the judgment is also vacated, in part, and this case is remanded to the District

Court with directions to revise its judgment in the manner indicated, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 15, 1978

Opinion for the Court filed by Circuit Judge McGowan

Opinion filed by Circuit Judge Tamm, concurring in part and dissenting in part.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

Civil Action #75-0043

[Filed May 15, 1978]

No. 76-1828

PRIVATE FRANK L. HUFF, ET AL.

v.

SECRETARY OF THE NAVY, ET AL., APPELLANTS

Before: McGOWAN, TAMM and ROBINSON,
Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed herein by appellants, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

Civil Action #75-0043

[Filed May 15, 1978]

No. 76-1828

PRIVATE FRANK L. HUFF, ET AL.

v.

SECRETARY OF THE NAVY, ET AL., APPELLANTS

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

On consideration of the suggestion for rehearing *en banc* filed by appellants herein, and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judges Tamm, MacKinnon and Robb would grant appellants' suggestion for rehearing *en banc*.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0043

[Filed May 27, 1976]

PRIVATE FRANK L. HUFF, ET AL., PLAINTIFFS

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This cause came on to be heard on the motion of plaintiffs for summary judgment and the cross-motion of defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings and the entire record, and counsel for the parties having been heard in open Court, and it appearing that there is no genuine issue as to any fact material to the disposition of this cause and that as set forth in this Court's Memorandum Opinion of May 21, 1976, plaintiffs are entitled as a matter of law to the entry of judgment in their favor against defendants in part, it is by the Court this 27th day of May, 1976,

ORDERED that the plaintiffs' motion for summary judgment be and is hereby granted in part in the respects set forth below; and it is further

ORDERED, ADJUDGED, and DECREED that:

1. The defendants denied plaintiffs Huff, Falatine, and Gabrielson their constitutional and statutory rights by prohibiting and/or restricting their distribution of petitions and other printed materials on-base at the Marine Corps Air Station, Iwakuni, Japan, through the arbitrary application of 1st Marine Aircraft Wing Order 5370.1A and Marine Corps Air Station Order 5370.3A;

2. 1st Marine Aircraft Wing Order 5370.1B, Marine Air Station (Iwakuni, Japan) Order 5370.3B, Fleet Marine Force, Pacific Order 5370.3, and Commander-in-Chief, Pacific Fleet Instruction 5440.3C are unconstitutional as applied to serviceman-to-serviceman distribution of printed materials on-base during off-hours and away from restricted or work areas;

3. MAWO 5370.1B, MCASO 5370.3B, FMFO 5370.3, and CINCPACFLTINST 5440.3C violate the rights of members of the Armed Forces under 10 U.S. Code § 1034 to circulate petitions to Congress on-base during off-hours and away from restricted or work areas;

4. The aforesaid regulations are constitutional as applied to off-base distributions in a foreign country in order to assure compliance with international agreements, such as the Status of Forces Agreement applicable in Japan, Article XVI, 11 U.S.T. 1664, T.I.A.S. 4510.

5. Defendants, their agents, servants, employees and attorneys, and all persons in active concert and

participation with them, be and hereby are restrained from continuing to deny plaintiffs their rights under the First Amendment to the United States Constitution and under 10 U.S. Code § 1034 by requiring prior approval for serviceman-to-serviceman distribution of printed materials during off-hours and away from restricted or work areas on-base at the Marine Corps Air Station, Iwakuni, Japan;

And it is further

ORDERED, ADJUDGED and DECREED that plaintiffs' motion for summary judgment in all other respects be and hereby is denied; and it is further

ORDERED that this Order is final and judgment shall be entered accordingly.

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

Copies to Counsel.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 75-0043

FRANK L. HUFF, ET AL., PLAINTIFFS,

v.

SECRETARY OF THE NAVY, ET AL., DEFENDANTS.

AFFIDAVIT OF
LIEUTENANT GENERAL LESLIE E. BROWN
UNITED STATES MARINE CORPS

I, Lieutenant General Leslie E. Brown, United States Marine Corps, being duly sworn, state that the matters set forth herein are true and correct to the best of my knowledge and belief:

Since July 1, 1975, I have served as Chief of Staff, Headquarters, United States Marine Corps. In this capacity I serve as the executive officer to the Commandant of the Marine Corps and am responsible for directing, coordinating, and supervising staff activities at Headquarters, United States Marine Corps, and performing such other duties as may be directed by the Commandant. These duties include the formulation and continual implementation of policies for the Marine Corps, including those policies being challenged in the instant lawsuit.

I have served in the United States Marine Corps since 1940 and have held a commission therein since

November of 1942. I am also personally familiar with the mission and operation of the First Marine Aircraft Wing, and with the Marine Corps Air Station, Iwakuni, Japan, having served as the Commanding General, First Marine Aircraft Wing, Marine Corps Air Station, Iwakuni, Japan, from April 25, 1972, until April 26, 1973.

The Marine Corps Air Station (M.C.A.S.), Iwakuni, Japan, consists of 1,451 acres immediately adjacent to the City of Iwakuni, Japan. Marine Corps units currently stationed at M.C.A.S., Iwakuni, consist of personnel, officer and enlisted, assigned to supporting the Air Station and the tenant tactical First Marine Aircraft Wing.

The mission of M.C.A.S., Iwakuni, is to maintain and operate facilities and provide services and material to support operations of the First Marine Aircraft Wing or units thereof, and other activities and units as designated by the Commandant of the Marine Corps in coordination with the Chief of Naval Operations. In order to accomplish its functional tasks of maintenance, operational training support, search and rescue, personnel services, shore patrol/armed forces policing, weather service, terminal radar and air traffic-control, and other support functions, M.C.A.S., Iwakuni, currently has assigned a total of 41 officers and 345 enlisted Marine personnel. Additionally, 39 officers and 624 enlisted Marine personnel are assigned from Marine Aircraft Wing resources under the Fleet Assistance Program (FAP). Current U.S. Navy personnel assignments consist of 12 officers

and 94 enlisted for medical, dental, and religious support purposes. The Commanding Officer of M.C.A.S., Iwakuni, is responsive to the Commanding General, Fleet Marine Force, Pacific, in his dual capacity as the Commanding General of Marine Corps Bases, Pacific.

The tenant tactical command currently headquartered at M.C.A.S., Iwakuni, is the First Marine Aircraft Wing and certain elements thereof.

The mission of the First Marine Aircraft Wing is to conduct air operations in support of the Fleet Marine Forces, Pacific, to include anti-air warfare, offensive air support, assault support, aerial reconnaissance, control of aircraft and missiles, and as a collateral function, to participate as an integral component of Naval Aviation in the execution of such other Navy functions as the Fleet Commanders direct. Functional tasks, in addition to the tasks associated with the above mentioned mission, include the coordination of overall training requirements, deployment of trained combat ready units/detachments aboard Navy ships, providing facilities for the control/handling of passengers, cargo, and casualties as may be required, conducting aerial refueling services, maintaining a ground defense capability, and to collect, process, evaluate, and disseminate intelligence.

In order to accomplish the assigned mission, the First Marine Aircraft Wing has approximately 7774 officer and enlisted Marine personnel assigned and 210 supporting U.S. Navy personnel assigned. Of this total, approximately 4974 Marines and 86 Naval

personnel are stationed at M.C.A.S., Iwakuni. The First Marine Aircraft Wing tactical units based at M.C.A.S., Iwakuni, may be categorized as Headquarters Support units, Marine Air Central units, attack and fighter-attack aircraft, and reconnaissance squadrons with an integral support unit capability, and support group units.

The First Marine Aircraft Wing is a task organization of various groups. These groups are composed of squadrons which provide the means, namely aircraft, support equipment, and administrative personnel, required to perform assigned tasks. The squadrons are the organizational building blocks employed in organizing air task-type units. The First Marine Aircraft Wing is the highest level tactical Marine Aviation command in the Far East.

The Fleet Marine Force, Pacific, is a balanced force of combined air and ground arms primarily trained, organized, and equipped for amphibious employment in the Pacific. The First Marine Aircraft Wing is the aviation component of Fleet Marine Force, Pacific, a type command under the Commander in Chief, U.S. Pacific Fleet. As our nation's Force-in-Readiness, the Marine Corps must therefore be prepared and ready when called upon to execute a rapid response as an effective air-ground team. Based upon this concept, the status of individual unit combat readiness is of vital importance to all Marine forces. The First Marine Aircraft Wing, not unlike the other Aircraft Wings, maintains the required combat readiness by continuous planned and coordinated training.

The First Marine Aircraft Wing, its personnel and equipment, is constantly maintained in a high degree of readiness for possible combat deployment on extremely short notice. For example, in early 1972, units of the First Marine Aircraft Wing stationed at Iwakuni, deployed to combat bases in Vietnam and Thailand within 24 hours of receiving notice. Later, during the spring of 1975, elements of the First Marine Aircraft Wing were rapidly deployed to assist in the evacuation of Phnom Penh and Saigon. At any time, the Wing may again be called upon to deploy under similar circumstances on a moment's notice. In this eventuality, the highest degree of loyalty, discipline, and morale will be necessary for the successful completion of the mission.

Personnel who are constantly prepared for deployment into combat or a crisis situation must at all times have the same strict discipline and high morale as would troops in actual combat situations. A well-trained and disciplined Marine, when considering the mission of the supporting units, must be prepared for instantaneous deployment for such contingency operations, ranging from protection/evacuation to combat operations. The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. The term Force-in-Readiness includes not only the material means to engage a potential adversary but also the mental capacity and discipline to adhere to orders, plus the will to engage and destroy the enemy. These traits must be inherent in

each Marine before he goes into combat and not a learning process reserved for the actual battlefield. Individual or collective efforts by those who would attempt, consciously or otherwise, to undermine good order, discipline, loyalty, and morale, cannot be tolerated. Therefore, the regulations under challenge in this lawsuit, which afford a Commander the ability and authorization to screen such printed material prior to its distribution, are in keeping with the requirement for the safety and well-being of his troops.

/s/ Leslie E. Brown
LESLIE E. BROWN
Lieutenant General
United States Marine Corps

Subscribed and sworn to before
me this 19th day of September, 1975.

/s/ Virginia M. Smith
Notary Public
My commission expires: 31 July 1978

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